IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

SAMUEL MARTINEZ ORDUNO,
Appellant.

No. 2 CA-CR 2018-0189
Filed September 23, 2019

Appeal from the Superior Court in Pima County
No. CR20174421001
The Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Diane Leigh Hunt, Assistant Attorney General, and
Kristen V. Canada, a student certified pursuant to
Rule 38(d), Ariz. R. Sup. Ct., Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Erin K. Sutherland, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Eppich and Judge Espinosa concurred.

E C K E R S T R O M, Judge:

¶1 In 2018, a jury convicted Samuel Orduno of sexual conduct with a minor under the age of fifteen for "placing his penis in her mouth." The jury found that the state had proven beyond a reasonable doubt that the victim "was 12 years of age or younger at the time of the offense." The trial court sentenced Orduno to life in prison without the possibility of release until he has served thirty-five years.[1] Orduno has appealed, contending he received an illegal life sentence under a statute that is unconstitutionally vague, and asks us to reverse that sentence and remand for resentencing.[2] We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

¶2 "A criminal sentencing scheme can be challenged on vagueness grounds, and the scheme is void for vagueness if it fails to state 'with sufficient clarity the consequences of violating a given criminal statute.'" *State v. Wagner*, 194 Ariz. 310, ¶ 11 (1999) (quoting *United States v. Batchelder*, 442 U.S. 114, 123 (1979)). We will find a sentencing statute "void for vagueness if it fails to give 'the person of ordinary intelligence a reasonable opportunity to know'" what penalty may be imposed for a particular crime, "'so that he [or she] may act accordingly.'" *Id.* (alteration in *Wagner*) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). Statutory interpretation is a question of law, which we review *de novo*. *State v. Cope*, 241 Ariz. 323, ¶ 5 (App. 2016).

¶3 The court sentenced Orduno under A.R.S. § 13-705, which provides for enhanced penalties for dangerous crimes against children. He contends the statute is unconstitutionally vague regarding the penalty for

[1]Orduno does not challenge the underlying conviction. Nor does he challenge his other thirteen convictions or the consecutive sentences—totaling 224 years in prison—the trial court imposed for those crimes.

[2]Orduno did not object to the sentence below, and our review is therefore limited to fundamental error review. *State v. Henderson*, 210 Ariz. 561, ¶¶ 18-22 (2005). Because we find no error, that ends our inquiry.

sexual conduct with a minor when, as here, the victim "was 12 years of age or younger at the time of the offense." In particular, he argues it is unclear which of three sentencing provisions apply when a person has been convicted of oral-contact-based sexual conduct with such a victim:

- § 13-705(A), which refers to victims who are "twelve years of age or younger";
- § 13-705(B), which refers to victims who are "under twelve years of age"; or
- § 13-705(C), which refers to victims who are "twelve, thirteen, or fourteen years of age."

¶4 Orduno is correct that the victim in this case, as defined by the jury, could be described by each of the three foregoing phrases in the statute; the jury could have concluded she was twelve or younger, under twelve, or twelve at the time of the offense. We nonetheless disagree that the penalty established by the legislature for his particular crime is vague.

¶5 Subsection (A) of the statute clearly applies. Orduno was convicted of "sexual conduct with a minor who is twelve years of age or younger," § 13-705(A), and the statute's express exception for masturbatory contact does not apply to his conviction for oral-contact-based sexual conduct. Thus, given the plain terms of subsection (A), the legislature has expressed its intent—and placed reasonable people on notice—that the crime for which Orduno was convicted carries a mandatory life sentence.[3]

¶6 Unlike subsection (A), which is only qualified by the exception for masturbatory contact, subsections (B) and (C) begin with the phrase "Except as otherwise provided in this section . . . ." § 13-705(B), (C). The legislature thereby clarified which sentence should be imposed when, as here, more than one subsection is triggered by the underlying conviction: if subsection (A) of the statute applies, subsections (B) and (C) do not.

¶7 Because § 13-705(A) unambiguously states that it applies to cases like the present one, and because subsections (B) and (C) of the statute

[3] Indeed, defense counsel did not dispute the state's assertion at sentencing that the guilty verdict on count one carried a mandatory life sentence, stating "we realize that given the nature of these charges, [t]he Court's discretion is extremely curtailed . . . [p]retty much no discretion with the first charge."

state that they do not apply when "otherwise provided," the sentencing scheme under which Orduno received his life sentence does not violate his rights to due process or equal protection of the law. *See Wagner*, 194 Ariz. 310, ¶ 10. We therefore affirm that sentence.